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RHB Bank Bhd v Yap Ping Kon & Anor

B HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO D5-22-520 OF 1995
RAMLI ALI J
5 JULY 2006

C *Civil Procedure — Action — Cause of action — Action filed before expiry of extended tenure of loan — Defendant defaulted in payment of installments — Whether action premature*

D *Contract — Agency — Principal and agent — Loan agreement — Whether first defendant entered into loan agreement in his own capacity or as agent for second defendant*

E *Contract — Illegality — Banking facility — Whether loan transaction was illegal — Contravention of statutes — Contracts Act 1950 s 24, Banking and Financial Institutions Act 1989 s 60(3)(c)*

F *Contract — Undue influence — Fraud — Whether plaintiff and second defendant exercised undue influence on first defendant in executing loan agreement — Whether second defendant and plaintiff had fraudulently induced first defendant to sign loan agreement*

G The plaintiff's claim against first defendant was for the sum of RM3,224,505.50 under the loan agreement dated 13 September 1993 entered into between Rakyat Merchant Bankers Bhd ('RMBB') and the first defendant. All RMBB's assets and liabilities were subsequently vested in the plaintiff. The plaintiff alleged that the first defendant had defaulted under the loan agreement. The issues were, inter alia: (1) whether the first defendant entered into the loan agreement in his own capacity or as agent for the second defendant; (2) whether the plaintiff and the second defendant
H had exercised undue influence on the first defendant in executing the loan agreement; (3) whether there was any settlement between the plaintiff and the second defendant to discharge the first defendant (4) whether the second defendant and the plaintiff had fraudulently induced the first defendant to sign the loan agreement by falsely representing to the first defendant that it was only a temporary loan for six months from RMBB in order raise sufficient funds to take over Khong Guan Holding Bhd;
I (5) whether the first defendant was only acting as a nominee and/or agent of the second defendant for the loan and the first defendant would be indemnified for all losses, claims, expenses or costs arising from the loan; (6) whether the action was

premature as the action was filed by the plaintiff on 12 September 1995, before the expiry of the extended tenure of the loan on 22 December 1995; and (7) whether the loan transaction was illegal being in contravention of s 24 of the Contracts Act 1950 by reason of fraud, and s 60(3)(c) of the Banking and Financial Institutions Act 1989 ('BAFIA'), by granting the loan without security.

Held, allowing the plaintiff's claim against the first defendant:

(1) Not only that there was no documentation evidence to prove the existence of nominee/agent-principal relationship between the first and the second defendant, the first defendant in executing the letter of offer and the loan agreement was fully aware of the fact that (at the time of signing all the relevant documents) there was nothing in writing to the effect that the loan was given for the second defendant and he only signed the documents as agent for the second defendant. Therefore, the first defendant had contracted in such a way as to make him personally liable to the facility granted by the plaintiff (see para 36).

(2) The law is trite in relation to the liability of a nominee and agent contracting on behalf of the principal. In arriving at the decision as to whether the nominee or agent should be held liable under a contract, the fact that the plaintiff had full knowledge of the existence of the nominee/agent-principal relationship was wholly immaterial. In the present case, the first defendant had executed the loan agreement 'in his own name without qualification'. In the premises, the first defendant shall be personally liable under the contract even if he is acting as the agent of the second defendant and that the plaintiff has full knowledge of the same (see paras 40–44).

(3) There was nothing to prove that the plaintiff and the second defendant had exercised undue influence on the first defendant. A contract entered into by a party under undue influence is voidable at the option of that party. Even if the existence of undue influence is proven, the first defendant had failed to exercise his right to rescind the loan agreement. Furthermore, the first defendant's argument that a presumption of undue influence arose based on the relationship of 'employer-employee' did not hold water (see paras 50–59).

(4) The argument of undue influence only arose after the present suit was filed. There was no contemporary evidence adduced by the first defendant to prove the representation made by the plaintiff and second defendant as alleged. In the absence of any contemporary evidence to prove the existence of undue influence at the material time, it amounted to an 'afterthought' argument and ought be disregarded by this court (see para 65).

(5) By looking at the surrounding circumstances of the case and the qualification of the first defendant, the first defendant failed to prove affirmatively that the plaintiff and the second defendant exerted undue influence on him to sign the loan agreement. The first defendant signed the loan agreement with his eyes open, fully aware of the effect of the same, ie that he has to repay the loan

sum in accordance to the terms of the loan agreement. Therefore, he was bound by the terms of the loan agreement (see para 70).

(6) The evidence put forward by the first defendant in establishing fraud and conspiracy were merely speculative and without supporting evidence. The first defendant's argument on this issue must fail (see para 93).

(7) There was no evidence to show that the second defendant had made payment for the loan interest on behalf of the first defendant. In fact the receipt for the interest payment was issued by RMBB to the first defendant, not to the second defendant. In the absence of evidence to the contrary, the first defendant himself should have made the payment of interest (see para 96).

(8) There was no evidence to show the existence of any valid settlement agreement whereby the plaintiff had agreed that the first defendant be discharged from liabilities under the loan agreement and the second defendant was to take over all the liabilities himself (see para 102).

(9) The loan confirmation rollover notice was a mere notification of change of effective interest rate and the effective period thereof and not for extension of loan period as alleged by the first defendant. It was also confirmed by PW2 that the consent from the borrower is not required for rollover. Therefore, in the absence of any other evidence of extension, the plaintiff was entitled to recall the whole facility after the tenure of six months as provided under the loan agreement. The first defendant had since defaulted under the loan agreement and the plaintiff had issued a letter of demand to the first defendant. The first defendant's allegation that the plaintiff's action was premature was without merit (see para 106).

(10) Even assuming the first defendant had succeeded in proving that the loan agreement was void under s 24 of the Contracts Act 1950, s 66 of the same Act provides that a person who has received any advantage under an agreement discovered to be void or under a contract which becomes void, is bound to restore it or make compensation for it, to the person from whom he received. In the present case, as far as the plaintiff was concerned, the loan was disbursed to the first defendant and it was the first defendant who had signed the drawdown notice. In other words, the first defendant was the one 'who has received the advantage' under the loan agreement. Therefore, the first defendant was bound to restore it or make compensation for it to the plaintiff (see para 111).

(11) Neither s 60 of BAFIA nor any other section in the Act declares that an agreement in contravention of s 60 is void (see para 118). Therefore, the argument of the first defendant that the loan agreement was in contravention of s 60 of BAFIA and therefore rendered void under s 24 of the Contracts Act must fail (see para 118–120).

(12) On the balance of probabilities the first defendant had failed to prove his claim against the second defendant. The evidence showed that the first defendant executed the loan agreement on his own behalf, not on behalf of the second defendant. There was no convincing evidence to show that the second

defendant had agreed to assume all liabilities of the first defendant in the loan transaction. That being the case, the court found that the first defendant's claim against the second defendant must also fail (see para 156).

[Bahasa Malaysia summary

Tuntutan plaintif terhadap defendan pertama adalah untuk sejumlah RM3,224,505.50 di bawah perjanjian pinjaman bertarikh 13 September 1993 yang dimasuki di antara Rakyat Merchant Bankers Berhad ('RMBB') dan defendan pertama. Keseluruhan aset dan liabiliti RMBB kemudiannya diletak hak kepada plaintif. Plaintif mengakatan bahawa defendan pertama telah mungkir di bawah perjanjian pinjaman. Isu-isu adalah antara lainnya; (1) sama ada defendan pertama memasuki perjanjian pinjaman berdasarkan kapasitinya sendiri atau sebagai agen untuk defendan kedua; (2) sama ada plaintif dan defendan kedua melaksanakan pengaruh tidak wajar ke atas defendan pertama dalam melaksanakan perjanjian pinjaman; (3) sama ada terdapatnya penyelesaian di antara plaintif dengan defendan kedua untuk melepaskan defendan pertama; (4) sama ada defendan kedua dan plaintif secara palsu mendorong defendan pertama untuk menandatangani perjanjian pinjaman secara salah menggambarkan kepada defendan pertama bahawa ianya hanyalah pinjaman sementara untuk enam bulan daripada RMBB bagi menaikkan dana yang mencukupi bagi mengambil alih Khong Guan Holding Bhd; (5) sama ada defendan pertama hanya bertindak sebagai penerima namaan dan/atau agen kepada defendan kedua untuk pinjaman tersebut dan defendan pertama perlu menanggung rugi untuk semua kerugian, tuntutan, perbelanjaan atau kos yang timbul daripada pinjaman tersebut; (6) sama ada tindakan adalah pra matang yang mana tindakan telah difailkan oleh plaintif pada 12 September 1995, sebelum luputnya tempoh lanjutan pinjaman pada 22 Disember 1995; dan (7) sama ada transaksi pinjaman adalah menyalahi undang-undang apabila menyalahi s 24 Akta Kontrak 1950 disebabkan fraud, dan s 60(3) Akta Perbankkan dan Institusi Kewangan 1989 ('BAFIA'), apabila memberikan pinjaman tanpa jaminan.

Diputuskan, membenarkan tuntutan plaintif terhadap defendan pertama.

(1) Bukan itu sahaja, tidak terdapatnya keterangan dokumentari untuk membuktikan kewujudan hubungan penerima namaan/ agen-prinsipal di antara defendan pertama dan defendan kedua. Defendan pertama dalam melaksanakan surat tawaran dan perjanjian pinjaman adalah menyedari sepenuhnya fakta bahawa (semasa menandatangani kesemua dokumen yang releven) tidak terdapatnya secara bertulis berkenaan dengan pinjaman diberikan kepada defendan kedua dan ia hanya menandatangani dokumen-dokumen sebagai agen defendan kedua. Oleh yang demikian defendan pertama mengikat kontrak secara demikian bagi membuatkan ianya sendiri bertanggungan terhadap kemudahan yang diberikan oleh plaintif (lihat perenggan 36).

(2) Adalah perkara biasa dalam undang-undang berkenaan dengan liabiliti penerima namaan dan agen mengikat kontrak bagi pihak prinsipal.

Dalam membuat keputusan berkenaan dengan penerima namaan atau agen perlu memegang tanggungan peribadi di bawah kontrak, fakta yang mana plaintif mempunyai pengetahuan penuh akan kewujudan hubungan penerima namaan/agen-prinsipal keseluruhannya adalah tidak penting. Di dalam kes ini, defendan pertama telah melaksanakan perjanjian pinjaman 'menggunakan namanya sendiri tanpa syarat'. Oleh yang demikian, defendan pertama adalah bertanggungan secara peribadi di bawah kontrak walaupun jika dia bertindak sebagai agen defendan kedua dan plaintif mempunyai pengetahuan penuh atas perkara yang sama (lihat perenggan 40–44).

(3) Tidak terdapatnya bukti bahawa plaintif dan defendan kedua melakukan pengaruh tidak wajar terhadap defendan pertama. Kontrak yang dimasuki di antara pihak di bawah pengaruh tidak wajar adalah boleh batal atas pilihan pihak tersebut. Walaupun jika kewujudan pengaruh tidak wajar dapat dibuktikan, plaintif telah gagal untuk menggunakan haknya untuk membatalkan perjanjian pinjaman. Tambahan pula, alasan defendan pertama bahawa satu andaian berkenaan pengaruh tidak wajar timbul berdasarkan hubungan 'pekerja-majikan' tidak boleh bertahan (lihat perenggan 50–59).

(4) Alasan berkenaan dengan pengaruh tidak wajar hanya timbul selepas tindakan sekarang difailkan. Tidak terdapatnya keterangan yang kontemporari yang dikemukakan oleh dfendan pertama untuk membuktikan representasi yang dibuat oleh plaintif dan defendan kedua seperti yang didakwa. Dengan ketiadaan mana-mana keterangan yang kontemporari untuk membuktikan kewujudan pengaruh tidak wajar pada masa sekarang, ianya menjadi satu alasan yang difikirkan kemudian 'afterthought' dan harus diabaikan oleh mahkamah ini (lihat perenggan 65).

(5) Dengan melihat kepada keadaan keseluruhan kes dan kelayakan defendan pertama, defendan pertama gagal membuktikan untuk dipersetujui bahawa plaintif dan defendan kedua menggunakan pengaruh tidak wajar ke atsnya untuk menandatangani perjanjian pinjaman. Defendan pertama menandatangani perjanjian pinjaman dengan mata yang terbuka dan menyedari keseluruhannya berkenaan dengan kesannya iaitu, bahawa beliau perlu membayar semula jumlah pinjaman menurut terma-terma perjanjian pinjaman. Oleh yang demikian beliau terikat dengan terma-terma perjanjian pinjaman (lihat perenggan 70).

(6) Keterangan yang diberikan oleh defendan pertama dalam membuktikan fraud dan konspirasi hanyalah spekulasi tanpa disokong dengan keterangan. Alasan defendan pertama berkenaan dengan isu ini semestinya gagal (lihat perenggan 93).

(7) Tidak terdapatnya bukti yang menunjukkan bahawa defendan kedua telah membuat bayaran untuk faedah pinjaman bagi pihak defendan pertama. Tambahan pula resit untuk bayaran faedah telah dikeluarkan oleh RMBB kepada defendan pertama, bukannya kepada defendan kedua.

Dengan ketiadaan bukti yang bertentangan, defendan pertama sendiri yang membuat bayaran faedah tersebut (lihat perenggan 96)

(8) Tidak terdapatnya bukti yang menunjukkan kewujudan penyelesaian perjanjian yang sah yang dengannya plaintif telah bersetuju bahawa defendan pertama dilepaskan daripada tanggungan di bawah perjanjian pinjaman dan defendan kedua telah mengambil alih keseluruhan tanggungannya (lihat perenggan 102).

(9) Notis pembentangan pengesahan pinjaman adalah hanya pemberitahuan berkenaan dengan perubahan kadar faedah dan tempoh masa yang dikuatkuasakan dan bukannya untuk lanjutan tempoh pinjaman seperti mana yang didakwa oleh defendan pertama. Ianya juga disahkan oleh PW2 bahawa kebenaran daripada peminjam tidak diperlukan untuk pembentangan. Oleh yang demikian, dengan ketiadaan bukti lain untuk lanjutan, plaintif berhak untuk menarik balik keseluruhan kemudahan selepas tempoh enam bulan seperti mana yang disyaratkan di bawah perjanjian pinjaman. Defendan pertama semenjak itu telah mungkir di bawah perjanjian pinjaman dan plaintif telah mengeluarkan surat tuntutan kepada defendan pertama. Dakwaan defendan pertama bahawa tindakan plaintif pra matang adalah tanpa merit (lihat perenggan 106).

(10) Walaupun mengandaikan defendan pertama telah berjaya dalam membuktikan bahawa perjanjian pinjaman adalah terbatal di bawah Akta Kontrak 1950, s 66 Akta yang sama memperuntukkan bahawa pihak yang telah menerima manfaat di bawah perjanjian yang didapati menjadi batal atau di bawah kontrak yang menjadi batal, adalah terikat untuk mengembalikannya atau membuat membayar ganti rugi untuknya, kepada pihak daripada mana beliau menerimanya. Dalam kes ini, sejauh mana plaintif mengambil perhatian, pinjaman telah dibayar kepada defenden pertama dan ianya adalah defendan pertama yang menandatangani notis pengeluaran. Dalam erti kata yang lain, defendan pertama adalah 'yang telah menerima manfaat' di bawah perjanjian pinjaman. Oleh yang demikian defendan pertama adalah terikat untuk mengembalikannya atau membayar ganti rugi untuknya kepada plaintif (lihat perenggan 111).

(11) Seksyen 60 BAFIA atau mana-mana seksyen di dalam Akta tersebut tidak mengisytiharkan bahawa perjanjian yang bertentangan dengan s 60 adalah terbatal. Oleh yang demikian alasan defendan pertama bahawa perjanjian pinjaman adalah bertentangan dengan s 60 BAFIA dan menyebabkan ianya terbatal di bawah s 24 Akta Kontrak semestinya gagal (lihat perenggan 118–120).

(12) Berdasarkan imbangan kebarangkalian defendan pertama telah gagal membuktikan tuntutannya terhadap defendan kedua. Bukti menunjukkan bahawa defendan pertama melaksanakan perjanjian pinjaman bagi pihak dirinya sendiri bukannya bagi pihak defendan kedua. Tidak terdapatnya keterangan yang meyakinkan untuk menunjukkan defendan kedua bersetuju untuk memikul kesemua liabiliti defendan pertama di dalam transaksi

pinjaman. Dengan ini, mahkamah mendapati bahawa tuntutan defendan pertama terhadap defendan kedua juga semestinya gagal (lihat perenggan 156).]

Notes

For a case on banking facility, see 3(2) *Mallal's Digest* (4th Ed, 2003 Reissue) para 3602.

For cases on cause of action, see 2(1) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 40–54.

For cases on principal & agent, see 3(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 2118–2119.

For cases on fraud, see 3(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 4836–4837.

Cases referred to

ABN-Amro Bhd v Ismail bin Mydinsah (Trading as Ismy Classic) [2004] 7 MLJ 30 (refd)

Abdul Razak Datuk Abu Samah v Shah Alam Properties Sdn Bhd & another appeal [1999] 2 MLJ 500 (refd)

Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal [1995] 2 MLJ 770

Ang Hiok Seng @ Ang Yeok Seng v Yim Yut Kiu (Personal Representative Of The Estate Of Chan Weng Sun, Deceased) [1997] 2 MLJ 45 (refd)

Bishop of Crediton v Bishop of Exerter [1905] 2 Ch 455 (refd)

Chai Then Song v Malayan United Finance Bhd [1993] MLJU 128 (refd)

Chait Singh v Budin bin Abdullah [1922] 1 FMSLR 348 (refd)

Ching Yuen Tung v BEP Arketik [1978] 1 MLJ 211 (refd)

Chung Khiaw Bank Ltd v Hotel Rasa Sayang Sdn Bhd & Anor [1990]1 MLJ 356 (refd)

Coramas Sdn Bhd v Rakyat First Merchant Bankers Bhd Anor [1994] 1 MLJ 369 (refd)

Guan Teik Sdn Bhd v Haji Mohd Noor bin Yakob & Ors [2004] 4 MLJ 433 (refd)

Haniff v Dustagir [1948-49] MLJ Supp 51 (refd)

Higgins v Senior 151 ER 1279 (refd)

Hong Leong Finance Ltd v Tay Keow Neo & Anor [1992] 1 SLR 205 (refd)

Hongkong and Shanghai Banking Corporation v Syarikat United Leong Enterprise Sdn Bhd & Anor [1993] 2 MLJ 449 (refd)

Hugh O'Rorke v John Joseph Bolingbroke [1877] 2 AppCas 814 (refd)

In Re Howagater and Osborn's Contract [1902] 1 Ch 451 (refd)

Juahir Sadikon v Pernbadanan Kemajuan Ekonomi Negeri Johor [1996] 3 MLJ 627 (refd)

Pernas Trading Sdn Bhd v Persatuan Peladang Bakti Melaka [1979] 2 MLJ 124 (refd)

Rusholme and Bolon and Roberts Hadfield, Ltd v S G Read & Co [1955] 1 All ER 180 (refd)

Saunders v Anglia Building Society [1971] AC 1004 (refd)

Sime Engineering Sdn Bhd v RM Leopad Sdn Bhd [2004] MLJ 634 (refd)

Ting Ling Kiew & Anor v Tang Eng Iron Works Co Ltd [1992] 2 MLJ 217 (refd)

UMW Industries Sdn (1985) Bhd v Kamaruddin bin Abdullah & Anor [1989] 2 CLJ 1278; [1619] MD 2 (refd)

United Malayan Banking Corp Bhd v Datuk Sri Chan Swee Ho & Ors [1978] 1 MLJ 222

Legislation referred to

Contracts Act 1950 ss 24, 62, 66
Evidence Act 1950 ss 92, 101, 103, 114(g)
Banking And Financial Institutions Act 1989 ss 60, 60(1), 60(3)(c)(e), 125

KA Gan (PY Ng with him) (Lee Hishamuddin Allen & Gledhill) for the plaintiff.
John Clark (Alvin Lai with him) (Sidek Teoh Wong & Dennis) for the first defendant.

Ramli Ali J:

THE PLAINTIFF'S CLAIM

[1] The plaintiff's claim against first defendant is for the sum of RM3,224,505.50 under the loan agreement dated 13 September 1993 entered into between Rakyat Merchant Bankers Bhd ('RMBB') and the first defendant for the principal amount of RM3m and interest pursuant to the terms and conditions contained therein.

[2] By a vesting order dated 22 July 1995 granted by the court, RMBB had agree to transfer all its assets and liabilities to BSN Merchant Bank Bhd. Thereafter, by another vesting order dated 7 January 1996 granted by the court, BSN Merchant Bank had agreed to transfer all RMBB's assets and liabilities to the plaintiff (RHB Bank Bhd).

[3] The plaintiff alleged that the first defendant has defaulted in making any repayments on any of the installments which are due and payable by first defendant to the plaintiff.

[4] Alternatively, if the first defendant is found not to be liable, the plaintiff claims against the second defendant the amount due under the said facility on the ground that the first defendant executed the loan agreement as agent for an on behalf of the second defendant and by reason of letters of indemnity given by the second defendant to the plaintiff and the first defendant.

[5] The second defendant in the present case had failed, neglected and/or refused to defend this case nor appointed any solicitors to defend his case.

THE FIRST DEFENDANT'S COUNTER CLAIM

[6] The first defendant contends, inter alia, that on the fraud and conspiracy committed by the plaintiff and the second defendant against the first defendant, the first defendant suffered monetary loss and substantial damage to his reputation.

[7] The first defendant claims from the plaintiff the following:

(a) damages of RM10m;

(b) rescission of the loan agreement and the right to non-performance on the first defendant's part;

(c) the plaintiffs right of action is against the second defendant directly;

(d) general damages; and

(e) interest and costs.

Alternatively The First Defendant's Claim Against The Second Defendant (Third Party)

[8] In the event that the first defendant is found liable against the plaintiff, then the first defendant claims the following from the second defendant (third party):

(a) that the first defendant be released from all liabilities with the plaintiff as he was the victim of fraud and conspiracy committed by the plaintiff and the second defendant and for the second defendant to take over liabilities of the first defendant to the plaintiff;

(b) a declaration that the second defendant is the actual borrower of the said facility granted by RMBB and be responsible directly to the plaintiff for repayment of the Loan and also indemnify the first defendant against all claims, damages, costs and expenditure related to the said loan; and

(c) damages and all costs incurred by the first defendant.

THE PLAINTIFFS CASE

[9] By a written agreement dated 13 September 1993 entered into between Rakyat Merchant Bankers Bhd ('RMBB') and first defendant, the plaintiff granted and the first defendant accepted and utilised the line of credit facility in the amount of RM3m on the terms and conditions contained therein.

[10] The documents related to the granting of this facility are as follows:

(a) the analysis credit of the first defendant;

(b) the letter of offer; and

(c) the facility agreement.

[11] The first defendant testified that he signed the loan agreement in the present of RMBB's solicitor. He also alleged that his name at pp 12, 13 and 38 of the loan agreement has been wrongly spelt. However, amendments were made by the solicitors and the amendments were sent over to him.

[12] The first defendant did not deny the fact that he has signed all the documents mentioned above.

[13] Pursuant to the said loan agreement, RMBB allowed the first defendant to drawdown RM3m under the said credit facility.

[14] A drawdown notice dated 16 September 1993 was issued by the first defendant to RMBB stating that the first defendant wishes to withdraw the amount of RM3m pursuant to the loan agreement and requested as follows:

(a) the sum of RM30,027.50 to be offset from the RM3m with legal fees and disbursements to Syarikat Radhakrishnan;

(b) the sum of RM30,000 to be offset from RM3m as 1% handling charges due to Rakyat Merchant Bankers Berhad; and

(c) the balance of RM2,939,972.50 to be paid by cheque in favour of the first defendant.

[15] Pursuant to the drawdown notice, RMBB issued a Malayan Banking cheque No 011766 dated 16 September 1993 for the sum of RM2,939,972.50 to the first defendant.

[16] Evidence relating to the disbursement of RM3m under the loan agreement to the first defendant pursuant to the notice of drawdown are as follows:

(a) the RMBB's bank statement with Malayan Banking Berhad for the month of September 1993 shows that the Malayan Banking cheque No 11766 has been cleared;

(b) the payment voucher for disbursement of facility to the first defendant also shown that the amount of RM2,939,972.50 has been disbursed to the first defendant through a cheque No 011766;

(c) the ledger card shows that RM3m was disbursed to the first defendant on 16 September 1993.

[17] The first defendant has defaulted in making any repayments on any of the installments and any of the interest charged thereon which are due and payable by the first defendant to the plaintiff despite numerous reminders by the plaintiff.

[18] As a result of the said breach, the plaintiff, by a letter from the plaintiff's solicitors dated 24 July 1995 terminated the said agreement and demanded for the payment of all monies due and owing under the said Facility as at 30 June 1995 amounting to RM3,224,505.50.

[19] The proof of posting of the letter of demand dated 24 July 1995 shows that the letter has been posted in accordance with the first defendant's address.

[20] The first defendant's statement of account as at 30 July 1995 shows that the amount due and owing by the first defendant as at 30 June 1995 is RM3,224,505.50.

THE DEFENCE BY FIRST DEFENDANT

[21] The first defendant's defence is based on the fallowings, namely:

(a) that the first defendant entered into the loan agreement not in his own capacity but as agent for the second defendant; and the actual borrower was the second defendant;

A (b) that there was an agreement between the plaintiff and the second defendant to relief the first defendant from all claims and accept the second defendant's liability in place of the first defendant;

(c) that there was conspiracy between the plaintiff and the second defendant to defraud the first defendant;

B (d) that the plaintiff's action is premature as it was filed (on 12 September 1995) before te expiry of the extended tenure of the said loan on 22 December 1995 pursuant to the loan confirmation for rollover by the plaintiff dated 23 November 1995; and

C (e) that the whole transaction in granting the said loan by the plaintiff to the first defendant was tainted with illegality.

Whether the first defendant entered into the loan agreement in his own capacity or as agent for the second defendant

D **[22]** The first defendant claims that he never at any time personally applied for any loan from the plaintiff. He signed the loan agreement on the request of and on behalf of the second defendant, who had informed him (the first defendant) that he (the second defendant) had obtained a larger loan of RM30m from the plaintiff and needed a few persons of good and clean credit standing to sign on behalf of the E second defendant for the said loan. The first defendant claims he signed the loan agreement because of undue influence, as at the material time, he was working in Nusantara Steel Corporation Sdn Bhd, a company controlled by and under the supervision of the second defendant. As such the first defendant claims that the actual borrower was the second defendant, not himself.

F **[23]** The court is satisfied that the loan agreement and other supporting documents show very clearly that the first defendant entered into the loan agreement and received the disbursement of the loan sum in his own personal capacity i.e. under his own name.

G **[24]** There is no evidence to support the claim that the first defendant was the agent of the second defendant in respect of the loan agreement. All the correspondence written by the second defendant subsequent to the entry of the loan agreement cannot be used and relied as evidence to support this claim. The evidence of this nature, at best, shows the attempt of the second defendant to negotiate with H the plaintiff to resolve the debt owed by the first defendant. The plaintiff however did not and has not agreed to such request for settlement.

[25] Any arrangement between the first defendant and the second defendant on the utilisation of the loan sum and the indemnity given by the second defendant to I the first defendant after the first defendant had received the monies from the plaintiff was between the first defendant and the second defendant. The plaintiff was not bound by the arrangement between the first defendant and the second defendant.

There was no evidence whatsoever that show the plaintiff had at the time of execution of the Loan agreement agreed to the arrangement between the first defendant and the second defendant.

[26] It is trite law that a party who signed a contract should be bound by the terms contained therein.

[27] In the present case, the first defendant did not deny the execution of the loan agreement, the drawdown notice and the letter of offer. However, it is his main defence that he was acting as the nominee or agent of the second defendant in entering the facility agreement with the plaintiff.

[28] The first defendant in his cross-examination admitted that he accepted the facility in his own name, although his name has been wrongly spelt at pp 12, 13 and 38 of the loan agreement; he waited for the amendments to be made and did not raised any objection as to the same. He also testified that the amendments were sent over to him.

[29] It is also the first defendant's case that he has been misrepresented by the second defendant and the plaintiff that the second defendant needed a few persons of good and cleans credit standing to sign on his behalf for a loan of RM3m each in order to raise RM30m. However, there is nothing stated in the loan agreement to suggest that the loan was obtained for the second defendant neither does it mentioned that the facility was given for the purpose of taking over Khong Guan Holdings as alleged by the first defendant.

[30] In the contrary, there are clear and undisputed evidence that the first defendant was contracting in his own name in obtaining the said facility of RM3m. The purpose of the loan was for 'personal investment' as evidenced by the analysis credit and the letter of offer,

[31] In *United Malayan Banking Corp Bhd v Datuk Sri Chan Swee Ho & Ors* [1978] 1 MLJ 222, the plaintiff commenced action against the defendant under an overdraft facility. The defendant claimed that he had a good defence to the action in that he was only the nominee of Kang Kok Seng, the managing director of the plaintiff company in all the loan agreement. The Federal Court held at p 224:

> But on the basis that there was this underwriting in the circumstances as alleged by the respondent, the defence to our mind and with respect, is no defence as against the appellant. If as he claimed that he was a nominee of this Kang Kok Seng, but in the borrowing of money from the bank, he was contracting in his own name as principal, he was nevertheless liable personally.

[32] In another Federal Court case of *Ching Yuen Tung v BEP Arketik* [1978] 1 MLJ 211, the respondent had been engaged to make a valuation of a site in

Sandakan. In the letter wrote by the appellant to the respondent confirming the appointment, the following words appear:

> Yours faithfully,
>
> For Continental Development Co NY
>
> Signed
>
> (Ching Yuen Tung)
>
> Authorised Overseas Agent

[33] The respondent completed the valuation and a copy of the valuation was sent to the Executive Vice-President of the company in New York upon the appellant's request. The respondent claimed payment but the appellant said that he was merely acting as the authorised overseas agent for the company in New York.

[34] The Federal Court held, at pp 212–213:

> there is no suggestion that the payment would not be made by the appellant but by his principal. If an agent contracts in such a form as to render himself personally responsible he cannot afterwards, whether his principal is disclosed or not at the time of the contract, relieve himself of responsibility. The test here is whether appellant had contracted in such a way as to make himself personally liable having regard to the surrounding circumstances... With respect, the learned judge was right to hold appellant personally liable in the light of the evidence.

[35] In *Ching Yuen Tung's* case, the appellant in signing the letter of appointment, have made known to the respondent that he is the authorised overseas agent for Continental Development Co NY The Federal Court however held that the respondent has contracted himself in such a way as to render himself personally liable under the contract.

[36] In the present case, not only that there is no documentation evidence to prove the existence of nominee/agent-principal relationship between the first and the second defendant, the first defendant in executing the letter of offer and the loan agreement was fully aware of the fact that (at the time of signing all the relevant documents) there is nothing in writing to the effect that the loan was given for the second defendant and he only signed the documents as agent for the second defendant. Therefore, the first defendant has contracted in such a way as to make him personally liable to the facility granted by the plaintiff.

[37] The first defendant also contended that the plaintiff has knowledge that the first defendant is acting as a nominee or agent of the second defendant in executing the loan agreement and therefore is barred from bring an action against the first defendant.

[38] It is trite law that the issue of knowledge of the principal-nominee relationship is immaterial in determining the liability of an agent who contracted on behalf of the principal.

[39] In *Rusholme and Bolon and Roberts Hadfield Ltd v SG Read & Co* [1955] 1 All ER 180, the court held:

> The fact that a person is agent and is so known to be does not itself prevent his incurring personal liability. Whether he does so is to be determined by the nature and terms of the contract and the surrounding circumstances. When he contracts on behalf of a foreign principal here is a presumption that he isincurring a personal liability unless a contrary intention appears. The same presumption arises when he signs in his own name without qualification.

[40] Therefore, the law is trite in relation to the liability of a nominee and agent contracting on behalf of the principal. In arriving at the decision as to whether the nominee or agent should be hold personally liable under a contract, the fact that the plaintiff has full knowledge of the existence of the nominee/agent-principal relationship is wholly immaterial. In the present case, the first defendant has executed the loan agreement in *his own name without qualification.*

[41] Useful reference can be derived from the case of *Pernas Trading Sdn Bhd v Persatuan Peladang Bakti Melaka* [1979] 2 MLJ 124, in determining whether an agent should be held personally liable under a contract. In that case, the appellant sued the respondent for goods sold and delivered by the appellant to the respondent. The respondent defence is that the goods were ordered by them but he did so on behalf of and on account of Shahazam Sdn Bhd. There is a letter of admission by Shahazam Sdn Bhd that the goods were ordered for him. However, it must be noted that the letter was written not at the time when goods were ordered, but some three weeks after the respondent had been sued. There is no denial from the respondent that the goods were ordered by him and the goods were delivered to him. There is no dispute as to the genuineness of the sale invoices and delivery note.

[42] The Federal Court held, at p 125:

> In our view, the respondent's contention that goods were not ordered on their behalf must fail in view of the sales invoice and the delivery note. As regards the second proposition that the goods were ordered on behalf of Shahazam Sdn Bhd, the respondent relies upon the letter to prove that contemporaneously with the sales invoice and delivery note there was an oral agreement that the respondent were acting as an agent of Syahazam Sdn Bhd in order to get over the credit limits, and therefore without this sort of arrangements no further goods would be supplied to them. We have earlier observed that this letter was written not at the time when the goods were ordered but some three weeks after the appellants had commenced the suit against the respondents. The content of this letter therefore amount to nothing than an oral evidence which the respondent wish to lead in order to prove the second proposition, ie the goods were ordered on behalf Syahazam, and to support the first proposition, ie the goods were not ordered by the respondents, and thus contradict the sales invoice and delivery note. We feel that this course of action is not open to the respondents,

A as it is clear that under s 92 of the Evidence Act 1950, oral evidence to contradict, vary, add to or subtract from, the term of any contract, grant or other disposition of property which has been reduced in writing is not admissible. The sales invoice and the delivery note being the contract reduced in writing between the appellant and the respondents s 92 therefore applies …

B

[43] The facts of *Pernas Trading* case are of some similarities with the facts of the present case ie the first defendant has executed the letter of offer and the loan agreement but contended that he entered into the agreement as agent of the second defendant; that the loan sum was disbursed to the first defendant; and the letter from the second defendant was made not at the material time when the loan agreement C was signed.

[44] Therefore, on the above authority the first defendant shall be held personally liable under the loan agreement.

D **[45]** In the present case, the first defendant also contends that the plaintiff was fully aware that he was acting as an agent for the second defendant and that the plaintiff cannot hold him liable under the loan agreement.

[46] In relation to the issue of knowledge, the Federal Court in *Pernas Trading* case E had this to say at p 125:

Further, in this case, in our view, falls on all fours with *Higgins v Senior* 151 ER1279, in which it was held that in an action on a written agreement, purporting on the face of it to be made by the defendant and subscribed by him for the sale and deliveryof goods above the value of £10, it is not competent for him to discharge his liability by proving that the F agreement was really made by him by the authority of an as agent for a third person and that the plaintiff knew hose facts at the time the agreement was made or signed...

[47] In the premises, the first defendant shall be personally liable under the contract even if he is acting as the agent of the second defendant and that the plaintiff G has full knowledge of the same.

[48] In the circumstances, first defendant's argument that he should not be held personally liable by merely acting as the second defendant's agent or nominee must therefore failed.

H COERCION/UNDUE INFLUENCE

[49] The first defendant contends that the plaintiff and the second defendant have exercised undue influence on the first defendant in executing the loan agreement.

I **[50]** The court is satisfied that on the evidence there is nothing to prove that the plaintiff and the second defendant have exercised undue influence on the first defendant.

[51] A contract entered into by a party under undue influence is voidable at the option of that party. Even if the existence of undue influence is proven, the first defendant has failed to exercise his right to rescind the loan agreement. There is no evidential proof of rescission of the loan agreement by the first defendant.

[52] Section 62 of the Contracts Act 1950 provides:

> when a person at whose option a contract is voidable rescinds it, the other party need not perform any promise therein contained in which he is promisor. The party rescinding a voidable contract shall, if he has received any benefit thereunder from another party to such contract, restore the benefit, so far as may be, to the person from whom it was received.

[53] Therefore, even if the first defendant is said to be unduly influenced in executing the loan agreement and that he has exercised his right to rescind the same, the law provides that the first defendant ought to restore the benefit, ie the loan sum of RM3m to the plaintiff upon such rescission.

[54] In rebutting the facts asserted by the first defendant in establishing undue influence, the court relies on the following evidence:

(a) PW2 confirmed that a loan could be given to a borrower without written application by the borrower. Moreover, in the present case, there was an analysis credit of the first defendant.

(b) The first defendant has failed to procure any evidence (oral or documentary) to support his allegation that the second defendant has informed first defendant that he had earlier obtained a larger loan of RM30m from RMBB and that he needed a few person of good credit standing to sign on behalf of the second defendant for a loan of RM3m each in order to raise RM30m. In fact, the second defendant in his chief-examination testified that he could not remember whether he has requested the first defendant to get a loan from the plaintiff.

(c) The first defendant has failed to prove the existence of any 'special relationship' between the second defendant and the plaintiff (as alleged by him).

(d) At the material time, the first defendant is an employee of the second defendant. However it does not amount to a 'special relationship' either in law or in fact.

(e) There is no evidence to support the allegation that the second defendant and the RMBB's officer were present during the signing of loan agreement as claimed by the first defendant. According to PW1, apart from the first defendant, her friend named Abdul Hakim Kassim and two other borrowers for other loans were present. Encik Azizan Abdullah, the RMBB's officer, executed the Loan agreement on behalf of RMBB at a separate occasion at RMBB's office and not together with the first defendant as alleged.

(f) The first defendant failed to prove the identity of the co-called RMBB's officer who told him not to worry as there is a special arrangement between second defendant and the plaintiff. He who alleged must proof, adverse inference must be drawn against the first defendant in his failure to procure the attendance of the so-called RMBB's officer.

(g) There is no evidence to support the first defendant's submission that the signing of the loan agreement including the letter of offer took less than an hour.

(h) There is no evidence to support the first defendant's submission that the signing of the loan agreement including the letter of offer took less than an hour.

(i) In the absence of any supporting evidence, the mere allegation of undue influence must fail as the first defendant has acted independently when he executed the loan documents under his personal capacity.

[55] By relying on the presumption of undue influence, the first defendant submits that the burden then shifts to the plaintiff and/or the second defendant to disprove it.

[56] The court cannot agree with this submission in *Haniff v Dustagir* [1948–49] MLJ Supp 51, the court held:

> To plead undue influence it must be shown that the defendant possessed a general influence and dominance over the will of the plaintiff... the mere fact of situation of master and servant is insufficient.

[57] In a more recent case of *Hong Leong Finance Ltd v Tay Keow Neo & Anor* [1992] 1 SLR 205, the defendants alleged that the guarantee was obtained from them under the undue influence of their former employee, and also they did not know the contents and nature of the document which they signed and that they did not receive any independent legal advise before signing. They also alleged that they signed the document because they had faith and trust in their employer. The court held at p 219:

> Textbook writers and authorities are generally agreed that in the following cases, presumption of undue influence has been recognised:
>
> (i) parents and child and even a person in loco parentis and his charge;
>
> (ii) guardian and ward;
>
> (iii) doctor and patient;
>
> (iv) solicitor and client;
>
> (v) spiritual adviser and member of his congregation; and
>
> (vi) a man and his fiance.

> However, the presumption of undue influence does not apply as between the principal and the agent, landlord and tenant or employer and employee.

[58] Therefore, the first defendant's argument that a presumption of undue influence arises based on the relationship of 'employer-employee' does not hold water.

[59] The first defendant also alleges that he reposed trust and confidence in the second defendant and the plaintiff. During the cross-examination of the first defendant, the following facts were asserted:

(a) the RMBB's officer/second defendant informed him 'not to worry of the said loan as it was with special arrangement with RMBB and only for six months;

(b) no direct proof about the special arrangement between RMB and the second defendant;

(c) he cannot remember the name of the RMBB's officer who induced me to sign the agreement because that was the first and only time he met the officer;

(d) the officer of RMBB did not tell him that he doesn't have to pay the loan.

[60] In *Chait Singh v Budin Bin Abdullah* [1922] 1 FMSLR 348, the acting Chief Judicial Commissioner pointed out that the defendant in the case before him was an illiterate man and that a presumption of the same strength would not arise in the case of a man of better education and having the advantage of some business experience.

[61] In *Hugh O'Rorke v John Joseph Bolingbroke* [1877] 2 AppCas 814, it was held:

> It sufficiently appears that the principle on which equity originally proceeded to set aside such transaction was for the protection of family property; but this principle being once established, the court extended its aid to all cases in which the parties to a contract have not meet upon equal terms. In ordinary case search party to a bargain must take care of is own interest, and it will not be presumed that undue advantage or contrivance has been resorted to on either side; but in the case of 'expectant heir' or of persons under pressure without adequate protection, and in the case of dealings with uneducated ignorant person, the burden of showing the fairness of transaction is thrown on the person who sells to obtain benefit of the contract.

[62] In the present case, the first defendant was in his age of 44 at the material time. He is a member of Chartered Association of Certified Accountant more than 30 years (as testified by him during his chief-examination). In other words, the first defendant is an educated professional and a mature person at the point of time for which the loan agreement was executed by him. However, the first defendant alleges that he has executed a loan agreement for the amount of RM3m based on the representation made by the plaintiff's officer ie that he does not have to worry because there was some special arrangement between the plaintiff and the second defendant. It is also the first defendant's contention that the RMBB's officer who

made the representation is unknown to him. The first defendant only met the so-called officer of RMBB for the very first time during the execution.

[63] The first defendant during his cross-examination testified that the RMBB's officer and second defendant informed him *not to worry and that there is a special arrangement between RMBB and the second defendant.* However, the officer of RMBB did not tell him that he does not have to pay the loan. In other words, when the first defendant signed the loan agreement, he is fully aware of the effect of the same and that he will have to pay the loan in accordance with the terms contained therein.

[64] The argument of undue influence only arises after the present suit was filed. There is no contemporary evidence adduced by the first defendant to prove the representation made by the plaintiff and second defendant as alleged. In the absence of any contemporary evidence to prove the existence of undue influence at the material time, it amounts to an afterthought argument and ought be disregarded by this court.

[65] In *Haniff v Dustagir*, the court held:

> The courts will protect a party who can show he has been unfairly influenced to enter into an agreement under such circumstances as to preclude the exercise of free and deliberate judgment (*Hugueinin v Baseley*), but a man of business cannot invoke such aid because he later discovered he has assented to an agreement granting him less favourable terms and results than on mature reflection he regards adequate. It should be observed that in the correspondence between the parties which subsequently ensued and which precede this action, there is no mention of undue influence.

[66] In the present case, the following letters were produced by the first defendant during examination-in-chief namely letters dated 28 March 1994, 18 April 1994, 25 April 1994, 20 July 1994 and 20 July 1994.

[67] As evidence by the aforesaid letters, no assertion or allegation of undue influence by the first defendant and/or his solicitors to RMBB was ever mentioned. The only reason put forward by the first defendant in the aforesaid letters in denying his liability under the Loan agreement is that the second defendant has, by a letter dated 20 January 1994, directed the sum of RM3,547,515.47 in his account with RMBB to off-set the loan of the first defendant.

[68] The burden rests with the person who alleges undue influence to prove existence of the fact. This principle is enunciated in the case of *Hongkong and Shanghai Banking Corporation v Syarikat United Leong Enterprise Sdn Bhd & Anor* [1993] 2 MLJ 449.

[69] By looking at the surrounding circumstances of the case and the qualification of the first defendant, the first defendant failed to prove affirmatively that the plaintiff

and the second defendant exerted undue influence on him to sign the loan agreement. The first defendant signed the loan agreement with his eyes open and fully aware of the effect of the same, ie that he has to repay the loan sum in accordance to the terms of the loan agreement. Therefore, he is bound by the terms of the loan agreement.

FRAUDULENT ACT AND CONSPIRACY

[70] The first defendant further contends that the second defendant and the plaintiff had fraudulently induced the first defendant to sign the said loan agreement by falsely representing to the first defendant that:

(a) the second defendant wanted a few persons with good credit standing to sign on the behalf of second defendant for a loan of RM3m each to raise RM30m to buy shares in order to take over Khong Guan Holding Bhd with the assistance of RMBB.

(b) on 15 September 1993, the first defendant was requested by the second defendant to go to his office and was given by the officers of RMBB and RMBB's solicitors (PW1) a copy of letter of offer dated 20 August 1993 to sign and back dated to 6 September 1993;

(c) the second defendant and the RMBB officers pointed the first defendant at the letter of offer and stated that it was only a temporary loan for six months from RMBB in order raise sufficient funds to take over Khong Guan Holding Bhd.;

(d) the first defendant was only acting as a nominee and/or agent of the second defendant for the said loan and the first defendant would be indemnified for all losses, claims, expenses or costs arising from the said loan; and

(e) some Senior Managers in RMBB were involved in some huge loans given out to some individuals and companies and were charged.

[71] On this issue, in a Supreme Court case of *Ting Ling Kiew & Anor v Tang Eng Iron Works Co Ltd* [1992] 2 MLJ 217, the case of *Wallingford v Mutual Society* was referred where Lord Hatherley said at p 227:

> There is a question of fraud upon which I said I should touch in one moment. Now I take it to be as settled as anything well can be by repeated decisions, that the mere averment of fraud, in general term, is not sufficient for any practical purpose in the defence of a suit. Fraud may be alleged in the largest and most sweeping term imaginable. What you have to do is, if it be matter of account, to point out a specific error, and establish it by that evidence. Nobody can be expected to meet a case, and still less to dispose of a case, summarily upon mere allegation of fraud without any definite character being given to those charges by stating the facts upon which they rest.

[72] Based on the above authority the court must stress that the mere averment of fraud, in general term is not sufficient to prove the first defendant's allegation. The first defendant must point out the specific error and later establish it by evidence, beyond reasonable doubt.

[73] In the present case, the court is satisfied on the following findings, namely:

(a) no evidence other than oral evidence of the first defendant himself to support the allegation that the second defendant has obtained a larger loan of RM30m from RMBB. The fact that the said sum of RM30m is to be obtained to take over Khong Guan Holdings Bhd with the assistance of RMBB was not pleaded and not supported by any evidence.

(b) the identity of the RMBB's officer is unknown to the first defendant. In fact, other than the first defendant, no other witnesses testify as to the presence of any RMBB's officer during the signing of the loan agreement.

(c) solicitors for the first defendant tendered the original letter of offer (marked as exh P4A) and submitted that the date in the original Letter of Offer is 6 September 1993 and it was different from the date in the letter of offer (marked as exh P4). The first defendant submitted that P4 has been tempered or altered by the plaintiff. It must be noted that the duplicate copy of the letter of offer (marked as exh P4B) was also tendered by solicitors of the plaintiff during the trial and the date on P4B is 26 August 1993. Therefore, it is uncertain which of the document has been tempered or altered.

[74] Since the allegation of alteration of evidence was pleaded by the first defendant, the burden is on the first defendant to adduce handwriting expert evidence to prove that the alteration was made by the plaintiff's officer or by the solicitors. In the absence of the expert evidence and with the existence of contradicted contemporary evidence, inference cannot be drawn against the plaintiff.

[75] The first defendant submitted that the alteration is to reflect the proper loan transaction procedure, ie:

(i) that the letter of offer was accepted by the first defendant much more earlier than the date of the execution of the loan agreement dated 13 September 1993, and

(ii) to tie with the RMBB's letter of instruction dated 23 August 1993 to request the first draft to be ready by 26 August 1993.

[76] In the case of *Bishop of Crediton v Bishop of Exerter* [1905] 2 Ch 455, the Court held:

> ... we are certainly not laying down as a rule of law that the addition of words which cannot possibly prejudice any one, destroy the validity of the note. In other words, *Pigot*'s case is not now any authority that where the alteration is not material the deed is made void.

[77] In the present case, the date of the duplicate letter of offer (P4B) was 26 August 1993 whereas the date of the original letter of offer (P4A) was 3 September 1993. Even if it is true that the alteration has been made on the duplicate letter of offer, the alteration is immaterial and will not in any way affect the liability of the first

defendant who has executed the same. There is no material different even if the date of he letter of offer is 3 September 1993 as it will still produce the same result as if the date is 26 August 1993 ie:

(i) that the letter of offer was accepted by the first defendant earlier than 13 September 1993; and

(ii) that it is the plaintiff's instruction to its solicitors to prepare the first draft agreement by 26 August 1993.

[78] Therefore, the court is satisfied that the alteration on the letter of offer (even if proven), will not destroy the validity of the same.

[79] In relation to the charges against some particular RMBB's officer as a result of their involvement in some 'evil scheme' in granting 'illegal loans' to some borrowers, both DW2 and the first defendant himself admitted that the loan granted to them by RMBB were not mentioned in the newspaper cutting relating to the charges on some RMBB's officers.

[80] The following documentary evidence were also referred by the first defendant in proving fraud and conspiracy:

(a) letter of instruction dated 23 August 1993 showing that there must be some especial arrangements between the plaintiff and the second defendant to pre-approved the loan facility as the instructions to prepare draft loan agreement was made before the letter of offer was signed;

(b) the name of the first defendant was wrongly spelt on the loan agreement;

(c) the notice of drawdown was in breach of the clause which provides that two days notice is to be given to the bank to effect drawdown;

(d) the first defendant executed the notice of drawdown in blank;

(e) there is no application made by the first defendant for the credit facility; and

(f) the first defendant did not provide any information to substantiate the information in the analysis credit.

[81] In relation to the first defendant's allegation that there are some especial arrangements made between the plaintiff and the second defendant based on the letter of instruction dated 23 September 1993, PW2 testified that there is nothing strange about the letter. It is merely an instruction from RMBB to its solicitors, Syarikat Radhakrishnan to prepare the first draft of the loan agreement by 26 August 1993. PW2 also emphasised that there is nothing to prevent the bank from writing to it's solicitors to prepare for loan documentation even before the loan was accepted.

[82] It is an undisputed fact that the name of the first defendant has been wrongly spelt at pp 12, 13 and 38 of the loan agreement and amendments were made to

correct the same. The first defendant waited for the amendments to be done and the amendments were sent over to him.

[83] PW2 clarified that the reasons for the cheque to be issued on the same day as the date of the notice of drawdown was due to the nature of the loan. It is a loan for investment purpose where they need the money urgently.

[84] In rebutting the first defendant's allegation that the notice of drawdown has been executed in blank, there are numerous authorities, more particularly *UMW Industries (1985) Sdn Bhd v Kamaruddin bin Abdullah & Anor* [1989] 2 CLJ 1278; [1619] MD where the court held that:

> The plea of *non est factum* does no avail in favour of a person who has shown himself to be negligent. He has only himself to be blame for signing the blank guarantee forms.

[85] Again in the case of *Chai Then Song v Malayan United Finance Bhd* [1993] MLJU 128, the High Court totally adopted the principle of the above case.

[86] In another case of *Saunders v Anglia Building Society* [1971] AC 1004, Lord Wilberforce held:

> A person who signs a documents and parts with it so that it may come into other hands, has a responsibility, that of a normal man of prudence, to take care what he signs which if neglected, prevents him from denying his liabilities under the document.

[87] Lord Wilberforce in the aforesaid case went on to say:

> I would add that the onus of proof in his matter rests upon him to prove that he acted carefully, and not upon the third party to prove contrary.

[88] Hence, even if the notice of drawdown has been executed by the first defendant without particulars being inserted, the first defendant has only himself to be blamed.

[89] PW2 admitted that there is no application form for the said facility but there was a credit analysis (marked as P3). The information contained from the annual report of a company in which the first defendant is a shareholder.

[90] In the present case, the first defendant seeks to discharge himself from his liability under the loan agreement based on allegation of fraud and conspiracy. However, by referring to the oral and documentary evidence, the first defendant has failed to prove beyond reasonable doubt that the plaintiff and the second defendant had committed fraud and conspiracy as alleged by him.

[91] In *Ang Hiok Seng @ Ang Yeok Seng v Yim Yut Kiu (Personal Representative Of The Estate Of Chan Weng Sun, Deceased)* [1997] 2 MLJ 45, the Federal Court held at pp 59–60:

> From the wide definition of 'fraud' under s 17 of the Contracts Act, 1950, and as well as the leading authorities on the subject, where the allegation of fraud in civil proceedings concerns criminal fraud such as conspiracy to defraud, or misappropriation of money or criminal breach of trust, it is settle law that the burden of proof is the criminal standard of proof beyond reasonable doubt, and not on a balance of probabilities. It is now well established that an allegation of criminal fraud in civil or criminal proceedings cannot be based on suspicion or speculation merely.

[92] In the present case, the evidence put forward by the first defendant in establishing fraud and conspiracy are merely speculative and without supporting evidence. The first defendant's argument on this issue must fail.

Whether There Is Any Settlement Between The Plaintiff And The Second Defendant To Discharge The First Defendant

[93] The first defendant attempted to discharge himself for being personally liable under the loan agreement by saying that the second defendant has admitted that he is merely acting as an agent of the plaintiff.

[94] To support the allegation, the first defendant says that the second defendant had made such admission in a meeting held between them, the officers of the plaintiff and Bank Negara officers. The first defendant also alleges that the second defendant had made payment for the loan interest on behalf of the first defendant.

[95] After going through the whole evidence adduced during trial, the court finds that there is no evidence to show that the second defendant made payment for the loan interest on behalf of the first defendant. In fact the receipt for the interest payment was issued by RMBB to the first defendant, not to the second defendant. In the absence of evidence to the contrary, the first defendant himself should have made the payment of interest.

[96] In any event, it is trite law that a party assisting a third party to meet its financial obligation to a second party does not bind the party with privity contract with the second party. This principle is enunciated in *Sime Engineering Sdn Bhd v RM Leopad Sdn Bhd* [2004] MLJU 634.

[97] Other than the evidence of the first defendant, there is no supporting evidence to prove that there were meetings held between Bank Negara and the second defendant together with the first defendant as alleged by the first defendant. He who

A alleges must prove, in the absence of any supporting evidence to substantiate his allegation, adverse inference can be drawn against him by virtue of s 114 of Evidence Act 1950.

[98] The letter from RMBB to the second defendant (marked as exh P6) only
B requested the second defendant to confirm what was transpired during the meeting held between the second defendant, Encik Samsul Bahari Haji Sulaman and Encik Mohd Zin Mohd Shah on 26 January 1995. Nowhere in this letter mention that the bank shall discharge the first defendant from his liability. At the last paragraph of the letter, the second defendant was asked to confirm the contents of the letter by reverting on or before 28 February 1995. The second defendant has failed to revert
C on or before 28 February 1995. This offer for settlement therefore lapsed and of no effect 28 February 1995.

[99] The letter from the second defendant to the plaintiff (marked as exh P7) is an offer by the second defendant to request the plaintiff to release and discharge the first
D defendant from liability. In consideration to that, the second defendant would accept the liabilities of the first defendant and two other individual. There is no evidence that the plaintiff has agreed to the request by the second defendant. The endorsement of acknowledgement on the letter is just an acknowledgment of receipt of the letter and not an agreement of the contents.

E

[100] The communication between the plaintiff and the second defendant only started after the execution of the loan agreement. There is no evidence of any dealings or communications between the plaintiff and the second defendant prior to the execution of the loan agreement.

F

[101] On the above consideration, the court is fully satisfied that, on the evidence available, there is no evidence to show the existence of any valid settlement agreement whereby the plaintiff had agreed that the first defendant be discharged from liabilities under the loan agreement and the second defendant was to take over all the liabilities himself.

G

[102] The first defendant relies on a letter (at p 3 of bundle E) to show that there was an arrangement for the first defendant to be discharged from liabilities under the loan agreement. The court is of the view that this letter, (even to be accepted as evidence) does not affect the right of the plaintiff to enforce the loan agreement
H against the first defendant. The said letter was written at the time when the loan agreement was executed by the plaintiff and the first defendant. There is no indication to show that the plaintiff (being the lender) has consented to the said arrangement. The contents of the letter are contrary to the contents of the contemporary document, particularly the letter of offer and the loan agreement. From all the contemporary documents executed by the plaintiff and the first
I defendant, it is clear that the first defendant had contracted in such a way to make himself personally responsible for the loan.

PREMATURE ACTION BY THE PLAINTIFF

[103] The first defendant contends that the action was premature as the action was filed by the plaintiff on 12 September 1995, before the expiry of the extended tenure of the said loan on 22 December 1995, pursuant to the loan confirmation for rollover by the plaintiff dated 23 November 1995, when the first defendant claimed there was as yet no cause of action by the plaintiff against the first defendant. The first defendant submits that the initial 6 months period for the said loan was no longer effective as the plaintiff had frequently extended or 'rollover' the said loan period even after the current action was filed by the plaintiff against the first defendant.

[104] To answer the first defendant's argument on this issue, the court relies on the following evidence testified by the plaintiff's witnesses:

(a) PW2 was referred to p 21 of bundle C, ie a loan confirmation on rollover dated 18 March 1994 and he said:

> the purpose of this loan confirmation is as an advice issued to the borrower stating the interest rate and the amount of interest which is to be due over the interest period calculated on the principal amount disbursed as stated therein. The word 'rollover' means the act of fixing interest rate on the principal amount disbursed over the interest period as stated in the loan confirmation.

(b) PW3 was also referred to the same document and he said:

> this is the notice to inform the borrower that the principal sum of RM3m had been disbursed and the interest amount for that particular period was calculated based on the principal sum disbursed.
>
> PW3 went on to say:
>
> the word 'rollover' mean the act of fixing the interest rate for that particular period on the principal sum disbursed. It is the act of fixing the prescribed rate. The maturity date is the date when the interest amount is due and payable. This is not an interest payment advice or interest payment notice.

[105] From the evidence above, it is clear that the loan confirmation rollover notice is a mere notification of change of effective interest rate and the effective period thereof and not for extension of loan period as alleged by the first defendant. It is also confirmed by PW2 that the consent from the borrower is not required for rollover.

[106] In the absence of any other evidence of extension, the plaintiff is entitled to recall whole facility after the tenure of six months as provided under the loan agreement. The first defendant has since defaulted under the loan agreement and the plaintiff has issued a letter of demand (marked as exh P9) to the first defendant. The first defendant's allegation that the plaintiff's action is premature is without merit.

A LOAN TRANSACTION IS ILLEGAL

[107] The first defendant further contends that the said loan transaction is illegal being in contravention of s 24 of the Contracts Act 1950 by reason of fraud; and s 60(3)(c) of the Banking And Financial Institutions Act 1989 ('BAFIA') by granting
B the loan without security.

[108] Section 24 of the Contracts Act 1950 provides that the consideration or object of an agreement is unlawful if it is fraudulent, and in such cases, every agreement of which the object or consideration is unlawful is void.

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[109] The main issue to be determined here is whether the object or consideration of the said loan agreement was fraudulent as claimed by the first defendant. This issue had been dealt with earlier in this judgment. It has been held that the first defendant has failed to discharge the burden of proof as required under the case of Ang Hiok Seng to prove his allegation of fraud. Therefore, the question that the said loan
D agreement being void under s 24 of the Contracts Act 1950 does not arise, as there is no element of fraud being established by the first defendant.

[110] In any event, even assuming the first defendant had succeeded in proving that the said loan agreement is void under s 24 of the Contracts Act 1950, s 66 of
E the same Act provides that a person who has received any advantage under an agreement discovered to be void or under a contract which become void, is bound to restore it or make compensation for it, to the person from whom he received it. In the present case, as far as the plaintiff is concerned, the loan was disbursed to the first defendant and it was the first defendant who had signed the drawdown notice.
F In other words, the first defendant is the one who has received the advantage under the loan agreement. Therefore, the first defendant is bound to restore it or make compensation for it to the plaintiff.

[111] Section 60(1) of BAFIA, provides that:

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> subject to an order made by Bank Negara Malaysia, no licensed institution shall give any person any credit facility without security.

[112] Section 60(3)(e) of BAFIA provides that the requirement as to security (under subs 1) shall not apply to any credit facility given by an licensed bank or
H licensed merchant bank, except where the credit facility is given by such bank or merchant bank to its related corporation which is not an institution or other person referred to in paras (a) and (b) respectively.

[113] In the present case, Rakyat Merchant Banker Bhd (RMBB) who gave out the
I loan to the first defendant is at all material times, a licensed merchant banker as defined under s 60 of BAFIA. Therefore, by virtue of s 60(3)(e) of the same Act,

RMBB is exempted from complying with the requirement as to security as provided under s 60(1) of the Act.

[114] In the case of *ABN-Amro Bhd v Ismail bin Mydinsah (Trading as Ismy Classic)* [2004] 7 MLJ 30, the court held at p 38:

> It is also worthy to note that section 60(1) refers to 'any person and person as defined under s 2 of the Act includes an individual'. Therefore, pursuant to s 60(1) read together with subs (3) a licensed bank can give credit without security...

[115] In any event, even assuming the loan agreement is in contravention of s 60(1) of BAFIA, s 125 of BAFIA provides as follows:

> except as otherwise provided in this act, or in pursuance of any provision of this Act, no contract, agreement or arrangement, entered into in contravention of any provision of this act shall be void solely by reason of such contravention.
>
> Provided that nothing containing in this section shall affect any criminal liability of such person for a offence under this act in respect of such contravention.

[116] In *Coramas Sdn Bhd v Rakyat First Merchant Bankers Bhd Anor* [1994] 1 MLJ 369, the Supreme Court in referring to s 125 of BAFIA 1989, held at pp 376–377:

> ... the Act does not in terms say that an agreement or arrangement in direct contravention of is to be void. On the contrary, it provides by s 125, a saving provision in the Act, no contract or arrangement, in contravention of any provision of the Act, shall be void solely by reason of such contravention.

[117] In the present case, neither s 60 of BAFIA nor any other section in the Act declares that an agreement in contravention of s 60 is void.

[118] In *Coramas*'case, the Supreme Court in arriving at its decision also said his:

> It might be that what caused the judge to adopt a wrong approach to the question of construction which arose fordecision was the general principle referred to by the Supreme Court tin the case of *Chung Khiaw Bank Ltd. v. Hotel Rasa Sayang Sdn. Bhd. & Anor* [1990] 1 MLJ 356 that a contract the making of which is prohibited by statue expressly or by implication, shall be void and unenforceable unless the statute itself saves the contract or there are contrary intention which can reasonably be read from the language of the statute itself.
>
> This general principle could have no application to the present case where the statute provides to the opposite effect; namely, that while it prohibits and penalize certain agreements or arrangements it nevertheless reveals an intention that generally they shall be valid and enforceable.

[119] On the authority of *Coramas'* case, the argument of the first defendant that the loan agreement is in contravention of s 60 of BAFIA and therefore rendered it void under s 24 of the Contracts Act must failed.

Failure To Call Material Witness/Produce Relevant Document

[120] The first defendant alleges that the plaintiff has failed to produce the original letter of offer to show that the exact date of the letter of offer is 26 August 1993. It must be noted that the original letter of offer has been produced by solicitors for the first defendant (marked as exh P4A) to show that the date stated therein is 3 September 1993.

[121] On the other hand, solicitors for the plaintiff also produced the duplicate letter of offer (marked as exh P4B) bearing the same date of 26 August 1993, ie a same date as the letter of offer (marked as P4). In the absence of expert evidence, it is uncertain which letter of offer has been tempered with. It may be the one produced by the plaintiff (exh P4B) or the one produced by the first defendant (exh P4A).

[122] The first defendant also alleges that the plaintiff's failure to call the some witnesses has resulted to the inference under s 114(g) of the Evidence Act 1950 being drawn against the plaintiff.

[123] Section 101 of the Evidence Act 1950 reads as follows:

(1) whoever desires any court to given judgment as to any legal right or liability, dependent on the existence of facts which he asserts, must prove that these facts exists;

(2) when a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

[124] Section 103 of the Evidence Act 1950 read as follows:

> The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence unless it is provided by any law that the proof of that fact shall lie on any particular person.

[125] The court is of the views that the burden to call the following witnesses lies on the first defendant due to the following reason:

(a) Azizan Abdullah is the RMBB's officer who executed the loan agreement on behalf of RMBB. The loan agreement has been duly marked as exh P1 and therefore there is no requirement to call Azizan Abdullah as a witness. Furthermore, PW1, the solicitor who witness the signing of the loan agreement also proved that Azizan Abdullah signed the loan agreement on a separate occasion in RMBB's office. Therefore, the burden is on the first defendant who asserted his involvement in fraud and conspiracy to call him as witness;

(b) The first defendant alleges that an officer from RMBB attended the signing of the loan agreement and told him (the first defendant) not to worry as there was a special arrangement between the RMBB and the second defendant. His evidence is not supported by his own witness, ie DW2. DW2 did not in anyway in his testimony mention about the presence of any RMBB's officer during the signing. This is what DW2 said during his cross-examination: 'the three of us signed the loan agreements at the same time and same place before the same lawyer of Rakyat Merchant Banker'. PW1 on the other hand said that Azizan Abdullah, the officer of RMBB, signed the loan agreement in a separate occasion in RMBB's office. He who alleges must prove, the burden is on the first defendant to call the RMBB's officer who purportedly present during the signing of the loan agreement in support of his allegation on fraud and undue influence.

(c) It is the first defendant's contention that there is a need to call Encik Omar bin Abu Bakar who signed the letter of offer as witness. Again, the letter of offer has been marked as exh P4 and therefore there is no requirement to call the maker of the same. Since it is the first defendant who alleged that Encik Omar Abu Bakar has involved in the improper extension of loan to the first defendant, the burden is on the first defendant to call him.

(d) The letter dated 16 February 1995 (marked as exh P6) is a letter from RMBB to the second defendant requesting the second defendant to confirm what was transpired during the meeting held between the second defendant, Encik Samsul Bahari Haji Sulaiman and Encik Mohd Zin Mohd Shah (both from RMBB) on 26 January 1995. The contents of the letter speak for itself, the second defendant was asked to confirm that he would assume the total liability of the first defendant from his liability. At the last paragraph of the letter, the second defendant has failed to revert on or before 28 February 1995. Even if the contents of this letter is to be construed as a proposal for settlement by the plaintiff, it lapsed after 28 February 1995 and the second defendant's subsequent acceptance or confirmation is not valid.

(e) Other than the meeting on 26 January 1995 as mentioned in the letter dated 26 January 1995, there is no evidence of any other meeting held between Bank Negara and the second defendant. PW2 confirmed that there was no meeting between Bank Negara and second defendant which he knows of. On the other hand, it is DW2 who asserted that he attended two of the meetings held between the Bank Negara and the second defendant.

(f) In the case of *Juahir Sadikon v Perbadanan Kemajuan Ekonomi Negeri Johor* [1996] 3 MLJ 627, the Court of Appeal, after referring ss 101 and 103 of the Evidence Act 1950, held at p 639:

> … it is clear from the above provisions on whom the onus lies. In the present case, it is the plaintiff who had asserted that there exists a particular fact. viz. that there was an offer to sell the said land at the price between RM7,000 to RM8,000. The onus is on the plaintiff to satisfy the court that there was such an offer.

(g) In the present case, it is the first defendant's witness, DW2 who asserted that there are more meetings held after the meeting on 26 January 1995. Therefore, the onus is on the first defendant to call the material witness to prove the same.

[126] A perusal of the notes of evidence and the allegations made by the first defendant confirmed that the burden is on the first defendant to call the aforesaid witnesses. Hence, s 114(g) of the Evidence Act 1950 could not be invoked against the plaintiff. In fact, it should be reversed.

EFFECT OF TEMPERING WITH DOCUMENTS

[127] The first defendant submits that the letter of offer (marked as exh P4) and statements of account (marked as exh P16) were tempered with. The letter of offer was said to be tempered with by altering the date from 6 September 1993 to 26 August 1993.

[128] It is also the first defendant's submission that he 'believe' that the purpose of such alteration is to reflect the following:

(a) the letter of offer was accepted by the first defendant much earlier than the date of the loan agreement dated 13 September 1993; and

(b) to tie with the RMBB's letter of instruction dated 23 August 1993 requesting its solicitors to provide the first draft by 26 August 1993.

[129] In the present case, even if it is true that alteration has been made on the date of the letter of offer, no material purpose will be served on the whole loan transaction.

[130] Assuming the date of the letter of offer is 6 September 1993 and not 26 August 1993, it will still shows that the letter of offer was accepted by the first defendant earlier than the date of the loan agreement (dated 13 September 1993. Logically the date on the letter of offer does not have to be altered to achieve this particular purpose as alleged by the first defendant.

[131] In other words, even if there is an alteration on the letter of offer, it will not render it void. In the case of *In Re Howagater and Osborn's Contract* [1902] 1 Ch 451, the court held:

> It is established that a material alteration in a written instrument does and an immaterial alteration does not avoid it. The rule was first laid down, though not precisely in these words, with reference to deeds conveying freehold property; but it has been discussed in many cases, with the result that the rule as now established is held to be applicable to all written instruments, and is not confined to deed of purchase and sale of land.

The court went on to say this:

> It must be taken, however, with this qualification, that, in considering whether an alteration is material or not, you must have regard as to the particular instrument to see what its purpose is and what its office is. That is the obvious conclusion from the case of *Suffell v Bank of England*, where the Masterof the Rolls (Sir George Jessel) and the Lords Justices who

took part in the decision, and particularly Cotton LJ discussed the particular nature of a Bank of England note to show that the alteration there complained of was material, though that particular alteration might not have been material in another instrument.

[132] A letter of offer is an instrument to prove that the borrower has understood and accepted that terms offered by the bank before executing a same. It lies down the terms and condition in regard to the liabilities of the borrower.

[133] In the present case, the first defendant did not deny signing the letter of offer and contends that he knew about the alteration only after his solicitors tendered the original letter of offer (marked as exh P4A) during the court proceedings. Other than the date that is purportedly being altered, no single term in the letter of offer is varied.

[134] In other words, the alteration of date shall not affect the liability of the first defendant under the letter of offer and therefore rendered the alteration (even if proven), to be immaterial.

[135] The first defendant also alleges that by looking at the discrepancy in he statement of account at p 7 of bundle B and p 3 of bundle F, the plaintiff has manipulated various accounts of the second defendant to the detriment of the first defendant.

[136] In order to support his argument, the first defendant ought to prove that the second defendant has more than one account in the plaintiff's bank and that the plaintiff has manipulated the various accounts of the second defendant to the detriment of the first defendant. No single evidence was tendered to that effect. This argument has never been expressly put to the plaintiff's material witness such as PW2 and PW3 during their cross-examination. This failure may be treated as an abandonment of the pleaded case and if a party, in the absence of valid reasons, refrains trom doing so, then he may be barred from raising this argument. This principle has been enunciated in *Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal* [1995] 2 MLJ 770

CONTRADICTORY EVIDENCE

[137] The first defendant alleges that in the present case, there are some conflicting evidence between the testimonies of plaintiff's witnesses (especially PW2 and PW3) and the contemporaneous documents ie the statements of account.

[138] PW2 when being referred to the statements of account testified that there is no sufficient money in the second defendant's account as at the date the request on 20 January 1994. PW3 during his re-examination explained the reason why the said both statements of account are not acceptable because both statements did not show balances as at 2 November 1993. However, he further said that there is a document to support the payment made on 5 January 1994, ie p 4 and 5 of bundle B.

[139] In *Guan Teik Sdn Bhd v Haji Mohd Noor bin Yakob & Ors* [2004] 4 MLJ 433, the Court of Appeal, in dealing with conflicting evidence, held 439:

> In cases where conflicting evidence are presented before a court, it is the duty of the court not only to weigh such evidence on a balance of probabilities but it is also encumbent upon the court to look at all the documents that may tend to establish the truth or otherwise of a given fact. In this instance the learned trial judge discredited the evidence of the appellant, accepted the evidence of respondent wholeheartedly and disregarded the contemporary documents totally. We say that he had erred as he had failed to direct his mind to the probative effect of the contemporaneous documents. He should, after accepting the respondent's evidence, weighed it against the contemporaneous documents and evaluate whether such documents support the respondents' oral testimony …

[140] In the present case, the purpose of tendering the statement of account at p 2 of bundle B is to prove that there is no sufficient money in the second defendant's account for the plaintiff to carry out his request in the letter dated 20 January 1994 as testified by PW2.

[141] Given the fact that there is another statement of account for the same date (marked as exh P16), the duty is encumbent upon the court to look at all the documents that may tend to establish the truth of PW2's statement that there is in fact no sufficient money in the second defendant's account to carry out his request.

[142] The following contemporary evidence will be relied on by the court in establishing PW2 and PWS's statements:

(a) the letter dated 30 December 1993 from the second defendant to RMBB instructing RMBB to remit the deposit of RM3.5m in his account to Capital Corp Securities;

(b) the payment voucher issued by RMBB for the payment of RM3.5m to Capital Corp Securities;

(c) the MBB cheque No 103010 dated 5 January 1994 for the amount of RM3.5m addressed to Capital Corp Securities Sdn Bhd;

(d) the office receipt issued by Capital Corp Securities Sdn Bhd for the payment of RM3.5m; and

(e) letter dated 20 January 1994 from the second defendant requesting RMBB to utilise the amount of RM3,547,515.47 in his account to off set the loan registered under the first defendant.

[143] By referring to the above evidence, it is proven on the balance of probabilities that the plaintiff has utilised RM3.5m in the second defendant's account to fulfill the second defendant's request to remit the deposit sum of RM3.5m to Capital Corp Securities. Therefore, it support the fact that there is no more sufficient fund in the second defendant's account to off-set the loan registered under the first defendant.

THE FIRST DEFENDANT'S COUNTER-CLAIM AGAINST THE PLAINTIFF

[144] The strength of the first defendant's counter-claim against the plaintiff is based on the alleged fraudulent act and conspiracy allegedly committed by the plaintiff and the second defendant in inducing the first defendant to sign the loan agreement. The first defendant claims that as a result of the conspired fraudulent action by the plaintiff and the second defendant, the first defendant has suffered substantial losses in terms of monetary losses and his reputation in the community. Further the first defendant claims that he had expended much time and money to try to resolve this suit with the plaintiff and his solicitors. He could not get into the Board or employment of any financial institution due to this suit and could not borrow from any financial institution due to his name being blacklisted.

[145] The court had considered at length the issue of fraud and conspiracy as alleged by the first defendant in the earlier part of this judgment. The court has also concluded that the first defendant has failed to prove the existence of any fraudulent act or conspiracy between the plaintiff and the second defendant that led to the first defendant having induced to sign and execute the loan agreement. That being the case, the sole strength of the first defendant's counter claim against the plaintiff must fail and the counter claim can be dismissed.

[146] The only evidence tendered by the first defendant in support of his losses is a letter from Bank Negara dated 10 October 1995, which reads:

> Saya merujuk kepada notis bantahan awal Ketua Pengarah Insurans bertarikh 25 Ogos 195 berhubung dengan cadangan tuan untuk melantik Encik Yap Ping Kon sebagai Pengarah The People Insurance Co (M) Sdn Bhd.
>
> 2. Surat tuan bertarikh 20 September 1995 adalah dirujuk dan diambil perhatian. Saya bagi pihak Ketua Pengarah Insurans dengan ini mengemukakan notis bantahan terhadap cadangan perlantikan Encik Yap Ping Kon sebagai pengarah People's Insurance Co (M) Sdn Bhd di bawah s 17B(1)(b) Akta Insurans, 1963.

[147] The first defendant, when asked for the reason for which his appointment was rejected, he said this:

> I believe it was due to this action against me that the Bank Negara Malaysia has barred my application.

[148] As stated in the letter dated 10 October 1995, there is in fact another notice of preliminary objection (notis bantahan awal) dated 25 August 1995 in relation to the appointment of the first defendant as director of The People Insurance Co (M) Sdn Bhd.

[149] The present action was filed on 12 September 1995 (even though the statement of claim had been amended on 4 August 1997). How could this action affect the appointment of the first defendant particularly when there is already a notice of preliminary objection before the letter dated 10 October 1995.

[150] Moreover, it appears that the first defendant is not certain as to what is the reason for the rejection. It is his 'believe' that it is due to the present action. No other witnesses were call to justify the reason of such rejection and to support the first defendant's belief and allegation.

[151] In the case of *Abdul Razak Datuk Abu Samah v Shah Alam Properties Sdn Bhd & another appeal* [1999] 2 MLJ 500, the Court of Appeal held, at p 508:

> ... damage for fraud are awarded on the basis that the innocent representee is put, so far as money can do so, in the position which he would have occupied had there been no reliance on the fraudulent inducement... the assessment of damages would therefore include all expenditure incurred reasonably and properly in consequence of and following directly from the deceit, whether before or after the date of the rescission.

[152] In the present case, the only evidence in support of his counter-claim is he letter dated 10 October 1995. Not only that, he has failed to adduce evidence to prove the reason of such rejection, the also failed to prove his losses subsequent to the rejection.

[153] Hence, his counterclaim against the plaintiff, must fail.

THE FIRST DEFENDANT'S CLAIM AGAINST THE SECOND DEFENDANT

[154] The strength of the first defendant's claim against the second defendant, in the event the first defendant is found liable for the plaintiff's claim is based on the contract of indemnity which the first defendant claimed to have been entered into between the first defendant and the second defendant. In the present case, the first defendant claims that the second defendant had promised and undertook to assume liabilities in respect of the said loan granted by the plaintiff to the first defendant.

[155] Taking the evidence of this case as a whole ie evidence of all the witnesses for the plaintiff, the first defendant, and the second defendant personally, the court is satisfied that on the balance of probabilities the first defendant has failed to prove his claim against the second defendant. The evidence show that the first defendant executed the loan agreement on his own behalf, not on behalf of the second defendant. There is no convincing evidence to show that the second defendant has agreed to assume al liabilities of the first defendant in the loan transaction That being the case, the court finds that the first defendant's claim against the second defendant must also fail.

CONCLUSION

[156] For the reasons given in this judgment, the court makes the following orders:

(a) the plaintiff's claim against the first defendant is allowed with costs;

(b) the plaintiffs claim against the second defendant is dismissed, without costs;

(c) the first defendant's counterclaim against the plaintiff is dismissed with costs; and

(d) the first defendant's claim against the second defendant is dismissed, without costs.

Plaintiff claim against first defendant allowed with costs.

Reported by Loo Lai Mee